PUBLIC PROSECUTOR

v.

YEE KIM SENG

HIGH COURT MALAYA, IPOH
AJAIB SINGH J
[CRIMINAL TRIAL NO. 12 OF 1980]
16 SEPTEMBER 1982

CONSTITUTIONAL LAW: *Mandatory death sentence under s. 57(i)(b) of ISA - Whether unconstitutional and deprives the exercise of the Court's discretion - Attorney-General's power in criminal proceedings - Exercise of - Whether subject to challenge - Question of bad faith - Discretion of Court in assessing sentence - Section 57(1)(b) Internal Security Act 1960 - Section 8 Arms Act 1960 - Articles 5(1), 8(1), 121(1), 145(3), 149(1) Federal Constitution.*

The accused in this case was charged for an offence punishable with death under s. 57(1) of the Internal Security Act 1960, i.e. for being in possession of a hand grenade in a security area without lawful excuse and without authority. Counsel for the accused raised a preliminary issue and submitted that the mandatory death sentence prescribed under s. 57(1)(b) of the Internal Security Act 1960 was unconstitutional as it infringes Articles 5(1), 8(1), 121(1) & 149(1) of the Federal Constitution. He submitted that there was discrimination when framing charges against accused persons as some were charged for possession of arms or ammunition under ISA which carries a mandatory death sentence while others were charged for possession of arms or ammunition without licence under s. 8 of the Arms Act 1960 where the offence is punishable with only a term of imprisonment or a fine. Consequently, this discrimination was unconstitutional and offends Article 8(1) of the Federal constitution. He idso submitted that the mandatory death sentence was unconstitutional as it deprives the Court from exercising any discretion on the question of sentence.

Held:

[1] Article 5(1) of the Federal Constitution was not infringed because the accused was not going to be deprived of his life or personal liberty except in accordance with law. And the law in this case is the Internal Security Act which is a perfectly valid law passed by Parliament. Section 57(1)(b) of the Internal Security Act does not contravene Article 149(1) of the Federal Constitution.

[2] The fundamental right of equility before t1he law and the equal protection of the law were not violated by the fact that the accused was charged under s. 57(1)(b) of the Internal Security Act and not under s. 8 of the Arms Act.

[3] The power relating to criminal proceedings as set out in Article 145(3) is vested with the Attorney-General, the most highranking law officer in the country and it was up to him to decide if he would charge any person and under which law depending on the evidence available to him and as such it must be presumed that he would exercise his power fairly and in the best interests of justice.

[4] In the present case there was no evidence of bad faith on the part of the Attorney-General nor was there any suggestion that he had acted beyond his power under Article 145(3) of the Federal Constitution, therefore the Attorney-General's power cannot be challenged as unconstitutional

[5] In criminal trials the High Court was empowered to pass sentence according to law and if the law prescribes a mandatory death sentence the High Court has no choice but to pass that sentence. The fact that the Court has no alternative does not make the mandatory death sentence unconstitutional.

[6] In the Court's view and for the reasons stated the constitutional validity of s. 57(1)(b) of the Internal Security Act cannot be challenged. The Internal Security Act with all the provisions therein is perfectly valid and there was nothing in the Act which had contravened the Federal Constitution.

[Ruling against the preliminary issue raised by defence.]

Cases referred to:
Ong Ah Chuan v. Public Prosecutor [1981] 1 MLJ 64

Legislation referred to:
Arms Act 1960, s. 8
Internal Security Act 1960, s. 57(1)(b)
Federal Constitution, arts. 5(1), 8(1), 121(1), 145(3), 149(1)

For the public prosecutor - Che Mokhtar bin Che Ali
For the accused - Ngeow Yin Ngee; M/s. Ngeow & Co.

JUDGMENT

Ajaib Singh J:

The accused in this case is charged for being in possession of a hand-grenade in a security area without lawful excuse and without lawful authority which is an offence punishable with death under s. 57(1)(b) of the Internal Security Act 1960. Mr. Ngeow Yin Ngee for the accused has raised a preliminary Issue and submits that the mandatory death sentence prescribed under s. 57(1)(b) of the Internal Security Act is unconstitutional as it infringes articles 5(1), 8(1), 121 (1) and 149(1) of the Federal Constitution.

Article 5(1) states that "no person shall be deprived of his life or personal liberty save in accordance with law." Mr. Ngeow Yin Ngee submits that article 5(1) should be considered together with article 149(1) of the Federal Constitution in order to decide whether or not the mandatory death sentence under s. 57(1)(b) of the Internal Security Act is constitutional. Article 149(1) reads as follows:

> 149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
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> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
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> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
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> (c) to promote feelings of ill-will and hostillity between different races or other classes of the population likely to cause violence; or
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> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
>
> (e) which is prejudicial to the security of the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of the Article 5, 9, 10 or 13 or would apart

from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

The recital in the Internal Security Act is in the following terms:

> Whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia:
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> (1) to cause, aud to cause a substantial number of citizens to fear, organised violence against persons and property; and
>
> (2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established;
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> And whereas the action taken and threatened is prejudicial to the security of Malaysia;
>
> And whereas Parliament considers it necessary to stop or prevent that action;
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> Now therefore pursuant to Article 149 of the Constitution be it enacted by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Ra'ayat in Parliament assembled, and by the authority of the same, as follows:

Mr. Ngeow Yin Ngee submits that s. 57(1)(b) of the Internal Security Act is not "designed to stop or prevent" either 'of the two actions recited In the Act. Section 57(1)(b) has created an offence and has prescribed a penalty. This is not pursuant to but is contrary to article 149(1). This article is clearly meant to provide for legislation aimed at stopping or preventing any of the actions listed in it but it is not meant to create offences and prescribe penalties. Mr. Ngeow Yin Ngee refers to s. 8(1) of the Internal Security Act which provides for preventive detention and submits that this s. 8(1) unlike s. 57(1)(b) conformed to article 149(1) for it is designed to prevent persons from acting in any manner prejudicial to the security of the country.

Next Mr. Ngeow Yin Ngee submits that s. 57(1)(b) contravenes article 8(1) which states that "all persons are equal before the law and entitled to the equal protection of the law." He says that the whole of Malaysia is a security area and there is discrimination when some persons are charged for possession of arms or ammunition as an offence in a security area under the Internal Security Act which carries the mandatory death sentence while other persons are charged for possession of arms or ammunition without licence under s. 8 of the Arms Act 1960 which is an offence punishable not with death but with only a term of imprisonment or a fine. Mr. Ngeow Yin Ngee submits that because of this discrimination the charge framed against the accused is unconstitutional as it offends article 8(1) of the Federal Constitution.

Lastly it is submitted that under article 121(1) of the Federal Constitution the judicial power is vested in the High Court and as such the Court should have a discretion in assessing sentence. A mandatory death sentence is unconstitutional because it deprives the Court from exercising any discretion on the question of sentence.

With respect I do not agree with any of the points raised by Mr. Ngeow Yin Ngee. Article 5 (1) of the Federal Constitution is not infringed because the accused is not going to be deprived of his life or personal liberty except in accordance with law. And the law in this case is the Internal Security Act which is a perfectly valid law passed by Parliament. Section 57(1)(b) of the Internal Security Act does not contravene article 149(1) of the Federal Constitution. In order to stop or prevent subversion it is necessary to provide for offences and prescribe penalties. Without suitable sanctions the Internal Security Act would be inadequate and ineffective to achieve its purpose which is "to provide for the internal security

of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persoris and property in specified areas of Malaysia, and for matters incidental thereto.

The fundamental right of equality before the law and to the equal protection of the law are not violated by the fact that the accused is charged under s. 57(1)(b) of the Internal Security Act and not under s. 8 of the Arms Act. Under Article 145(3) of the Federal Constitution the Attorney-General has the power exercisable at his discretion to institute, conduct or discontinue criminal proceedings for any offence. It is up to the Attorney-General to decide if he would charge any person and under which law depending on the evidence available to him. The power relating to criminal proceedings as set out in article 145(3) is vested in the most high-ranking law officer in the country and as such it must be presumed that he would exercise his power fairly and in the best interests of justice. Therefore if the exercise of his power under article 145(3) is to be challenged it must be shown to the satisfaction of the Court that in exercising his power the Attorney-General acted in bad faith or that he acted outside the scope of article 145(3) of the Federal Constitution. In the present case there is no evidence of bad faith on the part of the Attorney-General nor is there any suggestion that he acted beyond his power under article 145(3). The decision to charge the accused under the Internal Security Act and not under the Arms Act was a legitimate exercise of the Attorney-General's power under article 145(3) of the Federal Constitution and it cannot be challenged as unconstitutional.

Under article 121(1) of the Federal Constitution the High Court is vested with the judicial power of the Federation which means that the Court has Power to adjudicali in Civil and eriminal matters which are bronght before the Court. In criminal trails the High Court is empowered to pass sentence according to law and if the law prescribes a mandatory death sentence the High Court has no choice but to pass that sentence. The fact that the Court has no alternative does not make the mandatory death sentence unconstitutional. In the case of *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 which went up on appeal from the Singapore Court of Criminal Appeal to the Privy Council Lord Diplock had this to say on mandatory death sentences:

> There is nothing unusual an a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to somt extent diminished if it is not. At common law all capital sentences were mandatory; under the Penal Code of Singapore the capital sentence for murder and for offences against the President's person still is. If it were valid the argument for the appellants would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital - an extreme position which Counsel was anxious to disclaim.

The Courts are concerned with the administration of law and they are obliged to administer the law as it is found in the statute books. Whether or not the death sentence is morally right or wrong is a matter not for the Courts but for Parliament to decide. It may not be out of place however to mention here that in order to mitigate the extreme sentence of death there is provision for review by the Pardons Board and in suitable cases death sentences are commuted to life imprisonment and even to lesser terms of imprisonment.

In my view and for the reasons I have stated the constitutional validity of section 57(1)(b) of the Internal Security Act cannot be challenged. The Internal Security Act with all the provisions therein is perfectly valid and there is nothing in the Act which contravenes the Federal Constitution. I accordingly rule against the preliminary issue raised by the defence.

Also found at [1983] 1 CLJ 38